IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 5TH DECEMBER 2007 / 14TH AGRAHAYANA 1929

SA.No. 1015 of 1992(D)

AS.8/1988 of ADDL.DISTRICT COURT, THRISSUR
OS.257/1979 of MUNSIFF COURT,CHAVAKKAD
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APPELLANT/APPELLANT/PLAINTIFF:

SUBRAMANIAN, S/O. THALAPPILLY THAMI ALIAS KARAPPAN
AGED 49 YRS, CHERUVATHANI DESOM
ANJOOR VILLAGE, THALAPPILLY TALUK

BY ADV. SRI.P.K.SURESH KUMAR

RESPONDENTS:
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*1. AYYAPPAKUTTY S/O. THALAPPILLY THAMI ALIAS KARAPPAN
AGED 90 YRS, CHERUVATHANI DESOM
ANJOOR VILLAGE, TALAPPILLY TALUK - DIED

2. MARI ALIAS KUTTIAMMU
D/O. -DO- -DO- AGED 88 YRS

3. PONNI, D/O. -DO-

4. CHEERU, D/O. -DO-
AGED 84 YRS.

@ 5. DEVU ALIAS DEVAKI, -DO- STRUCK OFF

6. BHAVANI, D/O. -DO- MUTHUVAMMAL DESOM
ANJOOR VILLAGE, TALAPPILLY TALUK

7. VISWAMBHARAN, S/O. -DO-
KARIKKAD VILLAGE, MUTHUVAMMAL DESOM
TALAPPILLY TALUK

8. KANDAMBULLY VASU
CHERUVATHANI DESOM, ANJOOR VILLAGE
TALAPPILLY TALUK

& 9. MADHAVI, D/O. KODATHUR KRISHNAN, -DO- - STRUCK OFF

10. MULLATH RAMZAN (DIED)

11. GEORGE, S/O. VADAKKOOT KOLADI THAVU, ARTHAT DESOM
KUNNAMKULAM VILLAGE

12. MADHAVI, WIFE OF MULLATH PANJAN
AGED 60 YRS., CHERUVATHANI DESOM
ANJOOR VILLAGE, THALAPPILLY TALUK

13. JOY, S/O. VADAKKOOT KOLADY GEORGE
KANIAMPAL DESOM, KUNNAMKULAM VILLAGE

ADDL. RESPONDENTS:

14. T.A.SUBRAMANIAN, S/O. LATE AYYAPPAKUTTY
S/O. LATE AYYAPPAKUTTY, CHERUVATHANI DESOM
ANJOOR VILLAGE, THALAPPILLY TALUK

15. T.A. BALAN, S/O. LATE AYYAPPAKUTTY
CHERUVATHANI DESOM
ANJOOR VILLAGE, THALAPPILLY TALUK

(ADDL. RESPONDENTS 14 & 15 IMPLEADED AS LEGAL HEIRS OF DECEASED 1ST RESPONDENT AS PER ORDER DT. 19.9.06 IN I.A. 1835/04 IN R.S.A.)

(@ THE NAME OF R5 STRUCK OFF FROM THE PARTY ARRAY AT THE RISK OF THE APPELLANT AS PER ORDER DT. 28.10.99 IN C.M.P.1674/99)

(& THE NAMES OF RESPONDENTS 9 AND 10 STRUCK DOWN FROM THE PARTY ARRAY AT THE RISK OF THE APPELLANT AS PER ORDER DT. 29.7.2003 IN I.A.497/03)

R1 BY ADV. SRI.C.N.RADHAKRISHNAN
BY ADV SMT. P.K.NANDINI

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 05/12/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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S.A. NO. 1015 OF 1992

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Dated this the 5th day of December, 2007

JUDGMENT

Plaintiff in O.S.No.257/1979 on the file of Munsiff Court, Chavakkad is the appellant. Defendants are the respondents. Respondents 14 and 15 were impleaded as legal heirs of deceased first respondent. Appellant instituted the suit seeking partition and separation of his 1/5 share in the plaint schedule properties. Plaint A and C schedule properties are the immovable properties and plaint B schedule properties are movable properties, which according to appellant, are available for partition. Thami @ Karuppan, the father, admittedly died on 10.12.1973. He had two wives Malu and Kuttimalu. Respondent 1 to 5 are his children born to Kuttimalu the first wife. Appellant and defendants 6 and 7 are his children in the second wife Malu. Case of appellant was that claimed that respondents 2 to 4 being

daughters who were given in marriage 35 years back are not entitled to claim any share and fifth respondent being unsound and sixth respondent though daughter is also entitled to share. Appellant contended that plaint A and C schedule properties are to be divided into five equal shares and he is to be allotted one share. First respondent in the written statement contended tht plaint schedule properties are not available for partition. Appellant also contended that father Thami during his life time divided the property as per an agreement by which plaint C schedule property was given to the appellant and he is in possession of the property. He also stated that Thami was looked after by the wife of first respondent and hence he has no objection in giving plaint B schedule movable properties to her. First respondent resisted the suit contending that plaint A and C schedule properties are not available for partition. It was contended that O.S.85/1976 was earlier filed by first respondent

claiming partition and that suit was dismissed holding that suit is bad for partition and though Ext.A.S.17 of 1978 was filed, it is pending and plaint A and C schedule properties were assigned to first respondent by the father during his life time and therefore they are not available for partition. Subsequently he filed an additional written statement contending that father Thami purchased 45 cents scheduled in the written statement, which in fact is the property sought to be partitioned in O.S.85/1976 contending that it is available for partition and is to be divided between the sharers. Seventh respondent filed a written statement admitting the case of the appellant. Thirteenth respondent filed a written statement contending that he has purchased the property from first respondent and even if it is found that properties are to be divided, that property is to be set apart to his share.

2. Learned Munsiff originally dismissed the suit holding that appellant did not establish that

plaint schedule properties are available for partition. Appellant challenged the judgment before District Court, Thrissur in A.S.83/1984. Learned District Judge on reappreciation of evidence found that eventhough first respondent in the written statement admitted that the property shown therein is available for partition, trial court did not consider that question at all and even if plaint schedule properties are not available for partition, a decree for partition could have been granted in respect of the property scheduled in the written statement, if it is partible. The suit was therefore remanded. Subsequent to the remand learned Munsiff as per judgment dated 22.10.1987 once again dismissed the suit. Learned Munsiff found that plaint A and C schedule properties are not available for partition as under Exts.B2 to B9 sale deeds father had alienated the property during his life time in favour of first respondent and therefore as a legal heir of deceased Thami appellant is not

entitled to claim any share. Learned Munsiff also found that property shown in the written statement is not to be divided as plaintiff did not seek share in the said property. Appellant challenged the judgment before District Court, Thrissur in A.S.8/1988. Learned District Judge on reappreciation of evidence confirmed the finding of learned Munsiff and dismissed the appeal. It is challenged in the second appeal.

3. Second appeal was admitted formulating the following substantial question of law.

> Whether findings of lower appellate court that appellant is not entitled to partition is sustainable in law?

4. Learned counsel appearing for appellant and respondents 14 and 15 were heard.

5. The argument of learned counsel appearing for appellant is that appellant should not have been denied a share in the plaint schedule properties relying on Exts.B2 to B9 sale deeds,

as they are only sham and nominal documents. It was argued that as the properties originally belonged to the father and first respondent is claiming that father assigned them in his favour and there is no acceptable evidence to prove that the documents were acted upon, it should have been found that they are only sham and nominal documents and properties are available for partition. It was also argued that A and C schedule properties were acquired not by the father alone but by the father with the appellant and first respondent utilising their funds and therefore it should have been found that they are available for partition. Learned counsel appearing for respondents 14 and 15 argued that in view of Exts.B2 to B9, on the death of the father, those properties were not left behind to be inherited by the legal heirs and therefore no substantial question of law is involved in the appeal.

6. Appellant sought partition of plaint schedule properties raising a contention that

plaint A and C schedule properties belong to Thami, the father. It was also contended that the properties were acquired with the funds of appellant and first respodent. Learned Munsiff and learned District Judge on the evidence found that plaint schedule properties are not available for partition, as the properties were alienated by Thami during his life time under Exts.B2 to B9 assignment deeds. Though learned counsel appearing for appellant argued that Exts.B2 to B9 are sham and nominal documents, as rightly found by the courts below appellant had earlier filed O.S.132/1979 to set aside the alienations made by the father. That suit was dismissed under Ext.B16 judgment. Though it was challenged by filing an appeal, admittedly that appeal was also dismissed. In such circumstance, if the case of appellant that transactions are sham and nominal documents is true, appellant should have pleaded that case in O.S.132/1979. Moreover, there is no evidence to prove that they are sham and nominal documents.

Therefore courts below rightly found that plaint A and C schedule properties are not available for partition. Though the suit was originally remanded, in view of the contentions raised by first respondent that one item of property shown in the additional written statement is available for partition and trial court did not consider the availability of that property for partition, after remand trial court found that the said property is also not available for partition. Appellant did not claim a share in that property. First respondent also did not claim a share by challenging that finding in an appeal or cross appeal against the finding that the said properties are not available for partition. In fact O.S.85/1976 was earlier filed seeking partition of said property, which was dismised by the trial court. It was confirmed by first appellate court under Ext.A23 judgment holding that suit is barred for partial partition. First respondent had not paid any court fee and did not seek a share in

that property, though he claimed that the said property is available for partition. In such circumstance, no decree for partition could be passed. In the light of the earlier suit and its findings, courts below rightly found that appellant is not entitled to any share. There is no merit in the appeal.

Appeal is dismissed. No cost.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006